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No. 86-

In The Supreme Court

OF THE

United States

OCTOBER TERM, 1986

WILLIAM W. MARTIN, ROBERT E. MOSHER, AND THE LEGAL ACTION COMMITTEE FOR MARLIN INVESTMENTS,
Petitioners,

VS.

GILBERT ROBINSON, Trustee in Bankruptcy,
Respondent.

OPPOSITION OF RESPONDENT GILBERT ROBINSON TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals, in affirming the District Court's affirmance of Bankruptcy Court orders approving and implementing the so-called 1982 Settlement Agreement, has decided a special and important question of federal law in a way which is clearly in conflict with an applicable decision of this Court in an identical matter?

2. Whether the Court of Appeals, in affirming the District Court's affirmance of Bankruptcy Court orders approving and implementing the so-called 1982 Settlement Agreement, has acted in a manner which is in substantial conflict with a decision of another court of appeals in an identical matter?

LIST OF PARTIES

The parties to the proceeding in the United States Court of Appeals for the Ninth Circuit were:

Gilbert Robinson, Trustee in Bankruptcy, Appellee
William Everett Kane, Interested Party
Barbara Kelly, Interested Party
K&K Properties, Inc., Interested Party
William W. Martin, Objector, Plaintiff, Appellant
Robert E. Mosher, Objector, Appellant

Additionally, the Petition contains a list of numerous individuals who are described as constituting the members of the so-called "Legal Action Committee" for Marlin Investments (sometimes herein called "LAC"). Petitioners allege that it is on behalf of the LAC in addition to certain of those parties set forth above, that the proceeding in the Court of Appeals was pursued. Respondent believes that the LAC has no standing. It was one of at least two such groups allegedly organized prior to conversion of a Chapter XI case to one in liquidating bankruptcy. Such Committee was not confirmed by the Court in the liquidating bankruptcy proceedings. However, there is no question that Messrs. Martin and Mosher, in their individual capacity, have standing herein.

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WILLIAM W. MARTIN, ROBERT E. MOSHER, AND THE LEGAL ACTION COMMITTEE FOR MARLIN INVESTMENTS,
Petitioners,

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GILBERT ROBINSON, Trustee in Bankruptcy,
Respondent.

OPPOSITION OF RESPONDENT GILBERT ROBINSON TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondent Gilbert Robinson, Trustee in Bankruptcy, respectfully opposes the Petition filed by William W. Martin, Robert E. Mosher, and the so-called "Legal Action Committee for Marlin Investments" for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

I

STATEMENT OF THE CASE

A. Opinion Below

The opinion of the United States Court of Appeals for the Ninth Circuit, as amended on denial of rehearing, is reported at 784 F.2d 1377 (9th Cir. 1986). A copy of said opinion appears at Appendix "A" to this Opposition.

B. Jurisdiction

Respondent concurs with the position taken by Petitioners at page 1 of their Petition relative to the basis for jurisdiction of this Court, at least as to Petitioners Martin and Mosher. See comments concerning Legal Action Committee at p. ii, *supra*.

C. Statute Involved

Respondent concurs with the position taken by Petitioners at page 2 of their Petition relative to the statute which this case involves.

II

STATEMENT OF FACTS

A. Introduction

The Petition herein contains certain factual allegations not supported by the record on appeal, misstatements of alleged facts, recitations of stale facts irrelevant to this appeal and discussion of numerous matters not supported by the evidence. Respondent will refrain from commenting at this time on those materials since they do not appear to be relevant to the immediate issues before this Court. However, lest silence in the face of such actions invite the inference that said allegations are admitted,

Respondent represents that it is not his intention to admit the truth or admissability of any of such facts.

B. Narrative

A & C Properties, Inc. ("A & C"), a consolidation of eighteen (18) separate entities, having been unsuccessful in promulgating and confirming a plan of arrangement in Chapter XI Bankruptcy Act proceedings which had been pending since August, 1976, was adjudicated by the Bankruptcy Court as a bankrupt on September 10, 1979. Gilbert Robinson was thereafter appointed as Trustee in Bankruptcy ("Trustee").

Among the principal assets of the estate of A & C was the ownership of a substantial number of common shares of K & K Properties, Inc. ("K & K"), a Delaware corporation. K & K had received substantial property from A & C prior to the institution of A & C's Chapter XI case, with certain shares in K & K being delivered to the transferor entities in consideration for the transfer. Approximately 20% of the stock was retained by the owners of K & K, William E. Kane, III ("Kane"), Barbara Kelly ("Kelly") and related entities. The Trustee succeeded to A & C's majority stock ownership of K & K. When he was appointed as Trustee, his rights to those shares of stock were subject to an alleged voting trust, which, it was alleged, was controlled by Kane and Kelly and related entities.

The Trustee became involved in litigation relative to attempts to terminate that voting trust, and ultimately resolved it successfully. When the Trustee acquired the right to vote said shares, he caused a new independent slate of additions to the board of directors to be elected to assume control of K & K. Thereafter, following analysis by the Trustee of complaints made by various creditors, and a detailed investigation conducted by the Trustee in

addition to that separately conducted by the independent non-interested-party K & K directors, it was determined that a portfolio of disputes existed between the Trustee and Kane, Kelly, K & K and other persons and entities.

By way of general description, these disputes included the following. Creditors had asserted that a court-approved settlement entered into in 1977 (the "1977 Compromise") between A & C, as a Chapter XI debtor, K & K, Kane, Kelly, and others, should be set aside for various reasons, generally going to the merits of the underlying acquisition by K & K of property of A & C, and questions as to the propriety of the Bankruptcy Court's order entered in 1977 approving a settlement thereof. Disputes existed concerning the promulgation and extension of the voting trust relative to A & C's stock ownership in K & K, which the Trustee averred created affirmative rights of action in his behalf against Kane, Kelly and others. The Trustee asserted claims arising out of the creation by K & K, under the stewardship of Kane and Kelly, of a certain Employee Stock Ownership Plan ("ESOP") and Employee Stock Ownership Trust ("ESOT"), particularly the propriety and validity of certain purchases by the ESOT of shares of stock in K & K at what was asserted to be an unfairly low price. The Trustee further complained of the creation by K & K, prior to the Trustee's acquisition of voting rights, of certain indemnification and other management agreements and extensions, allegedly favoring Kane, Kelly, and other insiders.

Additionally, litigation was pending when the Trustee was appointed, having been instituted by some of the parties who are the Petitioners herein against Kane, Kelly, K & K and others. The litigation which affected the bankruptcy estate included a bankruptcy adversary proceeding, generally described as "Adversary D," filed by

one or more of the persons who are Petitioners herein, and a virtually identical Cross-Complaint filed by them in an action in the Superior Court of the State of California for the County of Los Angeles. The gravamen of those two suits appeared to be claims arising out of the alleged procurement of the 1977 Compromise through alleged fraud on the Bankruptcy Court, and related charges and claims arising out of alleged actions of Kane, Kelly, K & K and related entities during the Chapter XI case.

Upon concluding their respective investigations regarding the foregoing disputes, the Trustee and the non-interested-party K & K directors negotiated with Kane and Kelly, and other interested parties, and, after lengthy and protracted negotiations, ultimately arrived at an arm's-length settlement (the "Settlement Agreement", "Settlement" or "Compromise") which the Trustee felt he could recommend to the creditors of A&C, and which the independent and other members of K & K's board of directors unanimously endorsed as being in the best interests of K & K. This tortuously negotiated Settlement resolved all of the foregoing disputes. A copy of the Settlement Agreement, which, among other things, recites in great detail the specifics of numerous disputes to be compromised and the reasons for said Settlement, is appended to the Petition for Writ of Certiorari as Appendix "B" thereto.

Pursuant to the terms of the Settlement, the bankruptcy estate was to receive, *inter alia*, property of substantial consideration from Kane, Kelly and related entities as follows: transfer to the Trustee of 90,000 shares of K & K stock, valued by the Trustee at approximately $1,000,000, resignation by Kane and Kelly as officers of K & K, return to K & K of approximately $160,000 in indemnity funds held by their counsel or

counsel for entities controlled by them, and release by Kane, Kelly and others of all known claims against K & K and its officers, directors, *et al.*

For their part, Kane, Kelly and certain others were to receive from the estate a special release of particular claims as described in Article II.5.1.2 of the Settlement Agreement, confirmation of certain limited indemnification rights and the agreement of the Trustee to dismiss or to cooperate in the dismissal of certain litigation including the so-called Adversary "D" litigation.

The Trustee's Application to Compromise, which was filed on January 26, 1982, incorporated a copy of the proposed Settlement Agreement. The Bankruptcy Court ordered that notice be given to all creditors and parties-in-interest, which was accomplished. The application was opposed only by Petitioners Martin, Robert E. Mosher ("Mosher") and the so-called "Legal Action Committee for Marlin Investments" ("LAC"). These parties did not oppose the concept of a settlement. Rather, they argued that the Settlement Agreement which had been negotiated by the Trustee was too generous to the other parties.

Hearings on the Trustee's Application consumed five days of trial over a period of several months. Extensive oral and documentary evidence was presented, comprising a record which is well over 4,000 pages in length, with reporter's transcripts amounting to nearly 1,000 pages.

The Trustee testified that the Settlement Agreement appeared to him, after considerable investigation and negotiation, to be the best obtainable under the circumstances and to be clearly in the best interests of the estate. The Trustee's point of view as to settlement of the existing disputes was shared by K & K as to its interests, as evidenced by the testimony of its new president, one of the new, independent directors. He testified that, in his

opinion, the Compromise was the best possible under the circumstances from K & K's standpoint. In addition, tax counsel for K & K testified that, in his opinion, for numerous reasons, including various tax implications, the Compromise was in the best interest of all parties.

Except as to Petitioners, the Trustee's conclusion and recommendation was not opposed by any of the numerous creditors of the estate including those represented at the hearing on the Compromise. In fact, at the conclusion of the hearings on the Compromise, the single largest unsecured creditor of the bankruptcy estate represented that it believed the Settlement Agreement to be in the best interests of the estate and to be the best resolution available under the circumstances.

On June 18, 1982, the Bankruptcy Court issued its written Memorandum Decision approving the Settlement Agreement. Following numerous objections to form, and further hearings, the Bankruptcy Court ultimately entered its Order Compromising Controversy and its Findings of Fact and Conclusions of Law on Trustee's Application to Compromise Controversy on April 18, 1983. The Findings of Fact and Conclusions of Law had been disputed and argued over for nearly a full year after entry of the Bankruptcy Court's Memorandum Decision before they were entered.

Petitioners subsequently perfected an appeal to the District Court from the Order Compromising Controversy and other Orders entered by the Bankruptcy Court and engaged in a lengthy series of repeated motions directed at blocking consummation of the Settlement Agreement, all of which were denied. On appeal, the District Court considered the record before it and, on June 22, 1984, entered an Order affirming the Bankruptcy Court's Order which approved the 1982 Settlement Agreement and various implementing orders.

Petitioners thereafter perfected an Appeal to the United States Court of Appeals for the Ninth Circuit. Pursuant to an Order entered on March 17, 1986, (as amended pursuant to its Order Denying Rehearing and Amending Opinion which was entered on May 13, 1986), the Court of Appeals affirmed the District Court's Order and upheld approval of the Compromise. Petitioners then timely filed a Petition for Writ of Certiorari.

III

THE REQUESTED WRIT SHOULD NOT ISSUE BECAUSE NONE OF THE SPECIAL AND IMPORTANT GROUNDS FOR GRANTING A WRIT OF CERTIORARI EXIST IN THIS CASE

A. A Writ of Certiorari Will Only Be Granted When There Exist Very Special and Important Reasons Therefor

Rule 17 of the Rules of the United States Supreme Court provides that review on a writ of certioriari is a matter of judicial discretion and will be granted only when there exist special and important reasons therefor. As demonstrated below, no such special and important reasons exist in this case.

In addition, for certiorari to be granted in this case, Petitioner must establish either that the Court of Appeals has decided an important issue of federal law in a manner which is clearly in conflict with applicable decisions of this Court or that the Court of Appeals has rendered a decision which is clearly in conflict with the decision of another federal court of appeals on exactly the same matter.

The decision rendered by the Court of Appeals is not in conflict with an applicable decision of this Court or another federal court of appeals in a bankruptcy liquida-

tion case involving approval of a compromise recommended by a Trustee. Even if a conflict might otherwise be found to exist, it would certainly not be sufficiently special, important or material to justify the granting of the writ sought by Petitioners. Thus, the writ of certiorari sought by Petitioners should be denied.

B. The Court of Appeals Applied the Correct Standard for This Bankruptcy Liquidation Case

Petitioners contend that the Court of Appeals in this case, by affirming the Settlement Agreement, (1) countermanded the standards established by this Court for the evaluation and approval of such agreements; (2) applied a standard for the evaluation and approval of such agreements which is in conflict with the standard recognized by certain other federal courts of appeals; and (3) applied a standard which cannot be logically and consistently applied. Petitioners have failed to establish the validity of any of these allegations.

Approximately ten years ago, in its decision in the case of *In re Blair*, 538 F.2d 849, 851 (9th Cir. 1976), the Ninth Circuit articulated the factors to be considered in deciding whether to approve a compromise in a liquidation bankruptcy case as follows:

> "[T]he trustee and bankruptcy judge should weigh the probable costs and benefits. They should consider factors such as complexity and hazards of litigation, the expense (attorneys' fees and the costs of court and discovery), the time required, and whether disapproval of the compromise would likely result in the wasting of assets."

Id., at 851. *Cf.* Conclusion of Law No. 4.

In that case, the Ninth Circuit further stated that when considering approval of a compromise recommended by a trustee in a liquidation bankruptcy proceeding, the bank-

ruptcy judge and the district court may consider the following:

> "[T]he principals' belief that the factors outlined above (and others) have been explored and considered and that the compromise is fair, reasonable, and the wisest course. Consideration should also be given to the principle that the law favors compromise and not litigation for its own sake."

Id. Cf. Conclusion of Law No. 5.

These factors have continued to be considered in liquidation bankruptcy cases decided since that date under the former Bankruptcy Act and under the Bankruptcy Code. *See, e.g., In re General Store of Beverly Hills*, 11 Bankr. 539, 541 (Bankr. 9th Cir. 1981). In addition, as evidenced herein, this standard has been logically and consistently applied. The Court of Appeals in this case gave consideration to the factors articulated in the case of *In re Blair, supra. See In re A & C Properties*, 784 F.2d 1377, 1381 (9th Cir. 1986).

Petitioners aver that the applicable standard is not that set forth in *Blair, supra,* but that articulated by this Court in the case of *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson* ("*TMT Trailer*"), 390 U.S. 414, 424-25, 88 S.Ct. 1157 (1968), which involved a Chapter X Bankruptcy Act reorganization case. The Court of Appeals described the rule of that case as follows:

> "In *TMT Trailer*, this Court determined that:
>
> '[t]here can be no informed and independent judgment as to whether a proposed compromise is fair and equitable until the bankruptcy judge has apprised himself of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated. Further, the

> judge should form an educated estimate of the complexity, expense, and likely duration of such litigation, the possible difficulties of collecting on any judgment which might be obtained, and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise. Basic to this process in every instance, of course, is the need to compare the terms of the compromise with the likely rewards of litigation.' "

Petitioners allege that the Court of Appeals, by failing to require a "mini-trial" on the merits and an exhaustive inquiry into all matters related to the reasonableness of the Settlement, has rejected standards adopted by this Court in *TMT Trailer, supra,* and logical extensions thereof. *See, e.g.*, Petition at p.24. Petitioners have asserted that extremely stringent standards of the type heretofore only required in certain Chapter X reorganizations under the Bankruptcy Act, and certain non-bankruptcy matters, must be imposed in the approval and review of bankruptcy settlements in liquidating bankruptcy cases, including an elaborate hearing on the approval of the Settlement Agreement, constituting a mini-trial, thereby enabling Petitioners to inquire into various matters which the Bankruptcy Court found to be inappropriate for the hearing which was held in this case. Such was never the absolute rule in Chapter X, much less in liquidating bankruptcy cases.

To the contrary, the Ninth Circuit has clearly and consistently indicated in numerous decisions that the Bankruptcy Court is not required to conduct such an exhaustive investigation into the validity of an asserted claim in connection with its hearing on a proposed compromise in a *liquidation bankruptcy case. See In re California Associated Products Co.*, 183 F.2d 946, 949-950 (9th Cir. 1950); *Matter of Walsh Construction, Inc.*, 669 F.2d

1325, 1328 (9th Cir. 1982); *In re Blair, supra,* at 851-52; *In re Equity Funding Corp. of America,* 519 F.2d 1274, 1277 (9th Cir. 1975).

In the case of *In re Blair, supra,* the Ninth Circuit expressly considered the question of whether all of the dictates of this Court in the *TMT Trailer* Chapter X reorganization proceeding applied to a compromise pursuant to Section 27 of the Bankruptcy Act (11 U.S.C. Section 50). In considering that question, the Court stated as follows:

> "Appellant asserts that even in a liquidation bankruptcy compromise proceeding, there must be a mini-trial on the merits of claims sought to be compromised. We reject the notion. The *decision as to whether there should be a mini-trial in a liquidation bankruptcy as to the merits of the compromised claims and defenses is best left to the sound discretion of the bankruptcy judge* upon an application and showing of necessity by the interested parties or by creditors of the bankrupt.
>
> "*This is not the same as a Chapter X proceeding and there are sound reasons for drawing the distinction.* A corporate reorganization is a continuing business affair requiring close supervision and affecting many interested parties. The success or failure of a reorganization may hinge upon the very compromise at issue. A liquidation bankruptcy is a terminal affair. The bankrupt's financial affairs are beyond repair. *Liquidation is to be accomplished as rapidly as possible consistent with obtaining the best possible realization upon the available assets and without undue waste by needless or fruitless litigation.*"

Id. at 851-52 (emphasis added). *See also In re Flight Transp. Corp., supra,* at 1135 (citing *In re Blair).*

Thus, Petitioners err in asserting that the Court of Appeals has applied a standard which is in conflict with a decision of this Court involving a bankruptcy liquidation case. While the Court of Appeals has recognized and followed the basic standards established by this Court in *TMT Trailer, supra,* it has consistently applied those standards in a less stringent manner in bankruptcy liquidation cases for the reasons articulated above.

Petitioners have cited a line of cases decided by the Fifth Circuit for the proposition that there is a conflict of authorities between federal courts of appeals relative to the applicability of this Court's holding in *TMT Trailer, supra.* Petition at p.14.[1] None of the cases cited by Petitioners, however, involve liquidation bankruptcies.[2]

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[1]The cited cases include:

Matter of Jackson Brewing Co., supra (Chapter X reorganization); *In re: Corrugated Container Anti-Trust Litigation,* 643 F.2d 195 (5th Cir. 1981), *cert. denied,* 456 U.S. 998 and 456 U.S. 1012 (1982) (class action suit under the Clayton Act) and *the Matter of Aweco, Inc.* 724 F.2d 293 (5th Cir. 1984) *cert. denied,* 105 S.Ct. 1984) (reorganization case under Chapter 11 of the Bankruptcy Code).

[2]Petitioners allege that the Ninth Circuit has rejected the standards implemented by numerous other federal courts of appeals, including the Eighth Circuit.

However, Petitioners' assertions are refuted by the decision in the case of *Matter of Orrin A. Ericson,* 6 Bankr. 1002, 1010 (D. Minn. 1980) (that court has presumably applied the law applicable in the Eighth Circuit). In that Chapter XI reorganization case, the district court affirmed the bankruptcy court's approval of a settlement agreement. The court considered the question of whether the strict and elaborate *TMT Trailer* standard was applicable in a Chapter XI case and stated as follows:

> "Finally the appellants argue that the bankruptcy court failed to conduct a 'strident and piercing inquiry into the reasonableness of the settlement,' and that it was required to explain in detail how it weighed the strengths and weaknesses of the case.

Consequently, the distinctions between the standard applicable in bankruptcy reorganization as opposed to liquidation cases, as articulated above, apply in those Fifth Circuit cases as well.

In addition, Petitioners contend that the Ninth Circuit is in conflict with other federal courts of appeals because it does not recognize that, in considering whether a settlement is fair and reasonable, the probability of success on the merits is the most important factor. See Petition at p.24. The fact that one court may choose to put

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> In support of their position, they cite [*TMT Trailer*] [citation omitted]. However, the level of scrutiny of the compromises involved in that case does not apply here. *TMT Trailer* dealt with an intricate corporate reorganization under Chapter X of the Bankruptcy Act. The policies underlying Chapter X and Chapter XI are vastly different. Chapter X is designed for large, publicly-held corporations and contains many elaborate safeguards for creditors and stockholders. Chapter XI is designed for small businesses and sacrifices many safeguards in the interest of speed and efficiency. *See generally Securities & Exchange Commission v. American Trailer Rentals Co.*, 379 U.S. 594, 603-07, 85 S.Ct. 513, 518-20, 13 L.Ed.2d 510 (1965). Against this background, a detailed statement of reasons is more appropriate for Chapter X proceedings than for Chapter XI proceedings. *Cf. In re Blair*, 538 F.2d 849 (9th Cir. 1976) (held that dictates of *TMT Trailer* do not apply in liquidation bankruptcy context)."

Hence, that court found that the level of scrutiny of the compromise involved in the *TMT Trailer* case is not applicable to that Chapter XI case, notwithstanding that they are both reorganization cases. The Court cites the decision of the Ninth Circuit in the case of *In re Blair* as support for its conclusion. In light of the distinction drawn between Chapter XI and Chapter X reorganization cases, it appears that if faced with evaluating a compromise in a liquidation case, the Eighth Circuit would undoubtedly draw the same distinction as the Ninth Circuit between liquidation and reorganization cases and apply the standard of the Ninth Circuit as articulated in *In re Blair*. Thus, no conflict between the standard of the Ninth Circuit and other federal courts of appeals in liquidation bankruptcy cases has been demonstrated, or is known to Respondents.

greater emphasis on one of the many factors being considered than may another court, however, does not constitute a conflict between those courts. All of the factors must be considered based upon the circumstances of each individual case.

Accordingly, it cannot be concluded that the Ninth Circuit has rendered a decision in this case which is in conflict with the decision of another federal court of appeals on exactly the same matter. The Petitioners ignore, much less cite any authority for, the proposition that the distinction drawn between the applicable standards of review in bankruptcy liquidation as opposed to reorganization cases as articulated by the Ninth Circuit is without merit.

Even if, arguendo, the more stringent standards which might be imposed in certain Chapter X cases were applicable to the present case, the substantial record compiled after five days of extensive hearings held in connection with approval of the Settlement Agreement is more than sufficient to establish that the trial court considered the matter in the context of a full and complete record. It was appropriately satisfied as to the complexity and doubtful outcome of litigating the disputes which were compromised through the Settlement Agreement. The Settlement Agreement was reasonable, given the particular circumstances of the case and all of the other required factors.

C. The Court of Appeals Properly Applied the Correct Standard for This Bankruptcy Liquidation Case

Petitioners assert that by affirming the decision of the lower courts in this case, the Court of Appeals has failed to properly apply the applicable standards for reviewing the fairness of a compromise. They base this assertion on the grounds that the Bankruptcy Court purportedly misallocated the burden of proof, entered "boilerplate" find-

ings of fact and conclusions of law unsupported by the evidence, and conducted no so-called cost-benefit analysis. These allegations are without merit.

The Court of Appeals recognized that the Bankruptcy Trustee, as the party proposing the Compromise, had the burden of persuading the Bankruptcy Court that the Compromise is fair and equitable and should be approved. *A & C,* 784 F.2d at 1381. The Court of Appeals stated:

> "It is clear from the record that the trustee met this burden. The bankruptcy court held five days of hearing on the trustee's application for compromise. During the hearings, the bankruptcy court weighed the evidence presented, heard testimony on the fairness of the compromise, and considered the objections presented by the appellants." *Id.*

The Court of Appeals further stated as follows:

> "The record reflects the careful consideration given to the compromise by the bankruptcy court and the inordinate amount of expertise which went into the ultimate compromise approval." *Id.*

Petitioners' assertions regarding the inadequacy of the evidence before the Bankruptcy Court are unfounded. Not only did there exist the quantum of evidence necessary under the law to support the Bankruptcy Court's Compromise Order, there was abundant and convincing evidence in support therof. That substantial disputes existed was established through testimony at the hearing on the Trustee's Application for approval of the Settlement Agreement and can hardly be denied in light of the detailed description contained in the Settlement Agreement. The evidence established that the Settlement Agreement was recommended by the Trustee and approved by the Bankruptcy Court after five days of exhaustive hearings, notice of which was given to all interested

parties, and which resulted in an extensive evidentiary record. Petitioners participated actively in those hearings, and, at the conclusion thereof, filed briefs in support of their position.

That the Settlement Agreement was fair, reasonable and in the best interests of the bankruptcy estate is demonstrated both by economic benefits to be received by the estate pursuant to the Settlement Agreement and a clear consensus of witness testimony presented at the hearings. None of these matters was rebutted by competent evidence.

The Trustee testified that he had applied his approximately 25 years of experience and expertise as an attorney specializing in insolvency, bankruptcy, receiverships and trustee matters. In addition, he testified that the disputes (particularly described in the Settlement Agreement) which were resolved through the Compromise were extremely complex and involved areas of substantial disagreement as to fact and law between the parties to the Settlement Agreement. There was no contrary evidence presented. It was also the Trustee's testimony that further efforts in litigating these disputes would be expensive and time-consuming. There was no contrary evidence.

The Trustee testified that he believed the Settlement Agreement to be in the best interests of the bankruptcy estate, based upon the improved position granted the estate as to stock ownership in K & K, the uncertainties of the litigation it resolved and because it paved the way for an earlier distribution to A & C's creditors than might otherwise be the case. These latter two points were disputed by objectors, but the Court's ruling constituted a determination that the evidence supported the Trustee's contentions. The Trustee also testified that the 1982 Compromise was, in his view, the best that could be reached under the circumstances. The record establishes

that the Trustee's evaluation of the 1982 Compromise commenced immediately after his appointment and was based upon lengthy investigation and research both by him personally and particularly through his counsel, including interviews conducted with approximately two dozen individuals, and that the Trustee properly relied upon the work done by his counsel in that connection.

Carl Albert, the president of K & K, a company with substantial net worth, himself an experienced attorney and business executive, testified that in his opinion as an officer of a party and as a percipient witness to the negotiations, the 1982 Compromise was the result of extensive arm's length negotiation and was the best possible under the circumstances from K & K's standpoint. As of the date of the settlement, the Trustee had acquired a substantial stock interest in K & K through the successful resolution of litigation to terminate a voting trust relative to said stock. Continuing litigation was distracting the management of K & K from conducting its business; conservation of assets was being prejudiced and legal fees were "hemorrhaging the corporation." The Settlement was, in his opinion, necessary to resolve these problems. Although Petitioners, without authority or reason, have attacked the Trustee, arguing that he erred in permitting the directors of K & K to participate in negotiations (Petition at pp. 28 & 29), Mr. Albert's testimony refutes such contentions. Obviously, the Directors negotiated on behalf of K & K, while the Trustee acted on behalf of A & C, which was a principal, but not sole shareholder in K & K. Each was a party and the separate interests of each entity were properly, scrupulously and independently represented.

James V. Looby, counsel for K & K, agreed that the Settlement Agreement was the product of extensive arm's-length negotiation between A & C's Trustee, K & K

and the Kane and Kelly parties and stated his educated opinion and belief that it was in the best interests of all parties. Mr. Looby further testified that there would be material tax-related and other disadvantages to attempting to liquidate the assets of K & K while the Trustee was actively litigating the then pending disputes.

Except as to Petitioners, the Trustee's recommendation was not opposed by any of the numerous creditors of the estate, including those represented at the hearing. Mid-Jersey Trucking Industry Local 701 Pension Fund, the single largest unsecured creditor of these bankruptcy estates (holder of an allowed unsecured claim of $3,250,000), filed with the Bankruptcy Court a Memorandum of Points and Authorities dated June 2, 1982 in support of the Compromise.[3]

The very detailed Settlement Agreement, the foregoing testimony, the Court's substantial experience in this particular bankruptcy case, together with substantial additional evidence before the Bankruptcy Court, provided the basis for the cost-benefit analysis which was conducted. Further, the Bankruptcy Court was aware that the approval of the Compromise obviated the difficult and expensive prospect of attacking the Bankruptcy Court's Order approving the 1977 Compromise which was a result

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[3]That Memorandum, which was filed at the conclusion of the hearings on the Compromise, stated that the vast majority, in both number and amount, of creditors supported the position of the Trustee regarding the Compromise. It further stated that said claimant remains convinced after hearing the evidence adduced by the Objectors that the Settlement Agreement is in the best interest of the Estates" and "is the best resolution available under the circumstances." Furthermore, counsel for the claimant made a statement on the record at the hearing and expressed its support for the Settlement Agreement.

sought by Petitioners.[4] The Bankruptcy Court similarly was aware of the substantial, expensive and time consuming litigation which was settled pursuant to the 1982 Compromise and the doubtful outcome of that litigation.

There was substantial benefit to the estate resulting from the Settlement Agreement and this was one of the many factors considered by the Court pursuant to its cost-benefit analysis. Pursuant to the terms of the Settlement, the bankruptcy estate was to receive, *inter alia,* property of substantial value from Kane and Kelly as follows: (A) transfer to the Trustee of 90,000 shares of K & K stock, valued by the Trustee at the hearing on the Application of approximately $1,000,000; (B) resignation of Kane and Kelly as officers of K & K; (C) return to K & K of approximately $160,000 in indemnity funds held by counsel for Kane and Kelly or entities controlled by them; and (D) release by Kane and Kelly of all known claims against K & K and its officers, directors, *et al.*

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[4]Petitioners asserted that a weakness in the 1982 Settlement was the failure by the Trustee to give great weight to the value of certain claims against the other parties to the settlement, which claims had been previously expressly released in a court-approved settlement in 1977, during the Chapter XI phase of the case, particularly claims arising out of the acquisition by K & K of property from A & C. The record reflects that the Trustee had determined that it was imprudent on balance to attack a final court order some two years old, which had never been appealed, upon which the parties appeared to have acted in reliance, when weighed against the principle of finality and the benefits of the 1977 Compromise. The Trustee's opinion was that any claims of A & C against Kane, Kelly and K & K arising out of the original property transfers appeared to have been expressly released pursuant to the terms of the 1977 Compromise, which is made expressly binding upon successor trustees. The Trustee noted that the 1977 Compromise had been approved by the Bankruptcy Court in a final order entered after contested hearings in which the instant Petitioners also participated and which they approved.

The Findings of Fact and Conclusions of Law in general, and, in particular, Findings of Fact Nos. 9, 10 and 17 and Conclusions of Law Nos. 4 and 5, establish that the decision reached by the Bankruptcy Court was based upon its consideration of all of the appropriate factors designated by applicable case law.

In addition, the comments made on the record by the Bankruptcy Judge at the hearings demonstrated that it was his constant and conscious concern and intent that Martin, Mosher and the LAC be given a full and fair hearing in connection with the Settlement Agreement.[5] The record in the Bankruptcy Court, as discussed above and elsewhere herein, establishes that the Trustee presented substantial evidence to support the proposed settlement and to refute each of the arguments raised by Petitioners. Petitioners did not succeed in rebutting or modifying the direct testimony of the Trustee's various witnesses on cross-examination. Similarly, Petitioners put forward little if any evidence from which a conclusion contrary to that of the Trustee's witnesses could possibly be drawn.[6]

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[5]On the first day of the hearings the Bankruptcy Judge expressed his concern as follows: "I'm not going to fence Mr. Noble in, I think he should have a full hearing." At the conclusion of the fifth day of hearings, a substantial portion of which were devoted to objectors' own examination and presentation of their case, the Bankruptcy Judge again expressed this concern and intent when he invited the parties to file briefs in support of their respective positions and made the following remark in response to the Trustee's counsel's efforts to bring the hearing to a conclusion: "Mr. Gill, I have leaned over backwards in this hearing to make certain that there was a full and fair hearing." At the conclusion of the five days of hearings, numerous and voluminous briefs were filed, which included discussions regarding the benefits expected to be realized by the estate.

[6]Petitioners assign grievous error to the Court in excluding testimony of Petitioners' witnesses Kit Lokey and Roland M. At-

Respondent believes that the Bankruptcy Court's Compromise Order was not merely justified by the evidence presented at trial, but was indeed compelled by it. The Settlement Agreement was clearly reasonable given the particular circumstances of this case. Whether or not the Settlement was provident, there was certainly no abuse of discretion on the part of the Bankruptcy Court in entering the Order approving the Settlement Agreement or by either the District Court or Court of Appeals in affirming that Order. Accordingly, the Court of Appeals properly applied the correct standard for this bankruptcy liquidation case. No basis exists for granting the writ of certiorari sought by Petitioners.

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tenborough. The record, however, makes it clear that there was no error at all and certainly no prejudicial error. The record reflects that the Trustee's counsel successfully moved to exclude the expert testimony of Mr. Lokey, who was expected to testify that, in his opinion, the ESOP stock was undervalued. There was no issue insofar as the Trustee shared objectors' view that the ESOP stock was undervalued. Therefore Mr. Lokey's testimony would not have in any way advanced the case of the proponents or objectors. That is, one of the disputes resolved by the Compromise was the *Trustee's* allegation that said stock was undervalued. Petitioners argued that the Trustee settled his claim too cheaply.

As to Mr. Attenborough's testimony, the Trustee agreed that the offer of proof relative thereto made by Petitioners' (objectors') counsel would be accepted as a true representation of that to which the witness would testify. The Court disregarded that testimony because it had been offered by the objectors for the purpose of establishing a legal conclusion, the Court's determination ultimately reflected in Conclusion of Law 6, that rights to the ESOP shares would vest absent a Determination Letter. The decision of the Bankruptcy Court to disregard the testimony of Mr. Attenborough is supported by the case of *Owen v. Kerr-McGee Corp.*, 698 F.2d 236 (5th Cir. 1983) (the court stated that the Advisory Committee notes to Rule 704 of the Federal Rules of Evidence make it clear that the rule is not intended to allow a witness to give legal conclusions).

D. The Court of Appeals Properly Found That the Bankruptcy Court Rendered Its Opinion in a Thorough and Procedurally Proper Manner

(1) The Bankruptcy Court Entered Findings of Fact And Conclusions of Law That Are Supported by the Evidence

Petitioners have alleged that the Bankruptcy Court failed to make findings of fact which (1) reflect a reasoned analysis of the settlement, and (2) permit an appellate court to make a proper review. If this assertion were correct, it would not justify certiorari. *See* Section III.A., *supra*. The Court of Appeals, however, held that the record, when reviewed as a whole, supports a determination otherwise. *A & C, supra*, at 1382. It was correct.

Rule 52(a) of the Federal Rules of Civil Procedure provides that: "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." The findings and conclusions are neither clearly erroneous nor an abuse of discretion where they are based on substantial evidence. *In re Blair, supra*, at 851.

In the instant case, it is only necessary that the findings of fact and conclusions of law reflect the matters actually addressed by the Bankruptcy Court at the hearing on the Compromise and that their reflection in the findings of fact and conclusions of law comply with the requirements delineated in the case of *In re Blair*, and the other applicable cases.

The Bankruptcy Court analyzed the potential for prosecution of the claims released by the Settlement Agreement and found this course of action: "[c]omplex, uncertain of result and potentially expensive . . . in terms of attorneys' fees, court costs, and delay required, which

delay could reasonably be expected to result in damage to the estate or detriment to creditors." The record supports the Bankruptcy Court's findings of fact and conclusions of law, which are sufficiently comprehensive.

The Court of Appeals stated that the Bankruptcy Court had attached to its findings and conclusions a copy of the Settlement Agreement upon which it relied, and which it approved. The Court went on to state as follows:

> "The settlement agreement, which is twenty-five pages in length, sets forth in detail the claims which it purports to settle, the parties involved, the valuation of the corporate assets, the identity of shareholders and the number of outstanding shares, the cost-benefit analysis of the relative merits of pursuing or settling the various claims, and the conditions which would enable the trustee to proceed with the liquidation."

A & C, supra, at 1383.

The Court of Appeals further stated as follows:

> "It is clear from the record before us, which is well over four thousand pages with reporter's transcripts amounting to nearly one thousand pages, that the bankruptcy judge was informed and had apprised himself of all facts necessary to make an intelligent and independent judgment that the compromise was fair and equitable. The litigation was filed in the bankruptcy court in 1976, and the judge who approved the compromise had handled the matter since 1980. Thus, in addition to the settlement agreement, the bankruptcy judge had heard testimony on the value of the corporation's assets, the terms of the ESOT (which appellants challenge), and was well aware of the claims being asserted by appellants in their Adversary Prodeeding D, which was before the

> court. There is clear support in the record for our affirming the findings of fact with respect to the approval of the compromise." *Id.*

Thus, notwithstanding the fact that the Bankruptcy Court did not write an elaborate opinion explaining why it deemed the Compromise to be fair, reasonable and adequate, there is abundant support in the record to support the approval of the Compromise. Accordingly, the Court of Appeals properly affirmed the findings of fact with respect to the approval of the Compromise. However, even if there was some error in the Court of Appeal's conduct, it would certainly not be of a magnitude that would entitle Petitioner to the writ of certiorari which is sought.

(2.) A Specific Holding on Each Objection Was Not Required

Despite Petitioners' arguments, as discussed above, the Bankruptcy Court was not required to expand its hearing to the full scope discussed in the *TMT Trailer, supra*, case and, consequently, the Bankruptcy Court was not obligated to make more elaborate responses to each and every objection. The Court of Appeals noted that Petitioners failed to cite any case to support their allegation that the Bankruptcy Court's conduct constituted an abuse of discretion. Moreover, the Court stated that:

> "[W]here, as here, the evidence on the issue of the Compromise was thorough and comprehensive, the Court was familiar with the entire record and touched all material bases of the creditors' objections, and held directly, expressly or by necessary implication, on every substantial point of contention, the Court's approval of the Compromise does not constitute an abuse of discretion."

A & C, supra, at 1384 (citing *Jackson Brewing, supra*, at 312).

Thus, the conduct of the Court of Appeals in disposing of the various objections to the Compromise does not provide a basis for granting a writ of certiorari.

(3.) Any Inaccuracy in the Individual Findings of Fact and Conclusions of Law Constituted, at Most, Harmless Error

Petitioners take particular exception to certain individual findings of fact and conclusion of law. The findings of fact and conclusions of law entered in this case are based upon substantial evidence. However, even if any of these are other than strictly correct, the harm to anyone is questionable, and they would not, under any circumstances, rise to the level of clear error or an abuse of discretion. In addition, there has been no showing, nor can one be made, that any such inaccuracies give rise to a right in Petitioners to review by this Court.

E. Conclusion

Petitioners have failed to establish that the Court of Appeals has decided an important issue of federal law in a manner which is clearly in conflict with applicable decisions of this Court. Neither have they established that the Court of Appeals has rendered a decision which is clearly in conflict with the decision of another federal court of appeals on exactly the same matter. Based upon the foregoing reasons, the petition for writ of certiorari should be denied.

WHEREFORE, Respondent prays that the Court affirm the Order of the Court of Appeals, which upheld the Order of the District Court affirming the Bankruptcy Court's approval of the Settlement Agreement and related proceedings.

Dated: September 12, 1986

Respectfully submitted,

DANNING, GILL, GOULD, DIAMOND
& SPECTOR
DAVID A. GILL*
DAVID HERSKOVITZ

By _____
DAVID A. GILL
Counsel for Respondent Gilbert Robinson, as Trustee in Bankruptcy of A & C Properties

*Counsel of Record

APPENDIX

APPENDIX A

[784 F.2d 1377]

In re A & C PROPERTIES, Debtors.

William W. MARTIN, et al., Plaintiffs,

Superseded by Gilbert Robinson,
Plaintiff in Intervention,

v.

William E. KANE, Barbara Kelly, K & K
Properties Inc., and Investors
Replacement, Inc., Defendants.

William W. MARTIN, et al.,
Objectors-Plaintiffs-Appellants,

v.

Gilbert ROBINSON, Trustee in
Bankruptcy, Plaintiff in
Intervention, Appellee.

No. 84-6071.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Dec. 4, 1985.

Decided March 17, 1986.

As Amended on Denial of Rehearing
May 13, 1986.

Appeals were taken from an order of the United States District Court for the Central District of California, Robert M. Takasugi, J., affirming an order of the Bankruptcy Court, John E. Bergener, J., compromising bankruptcy controversy and approving a settlement agreement entered into between bankruptcy trustee and debtors. The Court of Appeals, Barnes, Senior Circuit Judge, held that record supported finding that agreement between bank-

ruptcy trustee and debtors settling dispute arising from a transfer of debtors' assets and liabilities in exchange for stock was fair and equitable; evidence on issue of compromise was thorough and comprehensive, bankruptcy court was familiar with entire record and touched all material bases of creditors' objections, and court held directly, expressly, or by necessary implication on every substantial point of contention.

Affirmed.

1. **Bankruptcy — 446(6)**

Bankruptcy court's order approving trustee's application to compromise controversy is reviewed under abuse of discretion standard.

2. **Bankruptcy — 467(4)**

Where district court summarily affirms bankruptcy court's orders without setting forth separate finding of fact and conclusions of law, district court is deemed to have adopted those of bankruptcy court.

3. **Bankruptcy — 252**

In determining fairness, reasonableness, and adequacy of a proposed settlement agreement, bankruptcy court must consider probability of success in litigation; difficulties, if any, to be encountered in matter of collection; complexity of litigation involved, and expense, inconvenience, and delay necessarily attending it; and paramount interest of creditors and a proper deference to their reasonable views in the premises.

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4. Bankruptcy — 252

While creditors' objections to a compromise agreement must be afforded due deference, such objections are not controlling.

5. Bankruptcy — 252

While bankruptcy court must preserve rights of creditors, it must also weigh certain factors to determine whether proposed compromise is in best interest of bankrupt estate.

6. Bankruptcy — 252

Record supported finding that agreement between bankruptcy trustee and debtors settling dispute arising from a transfer of debtors' assets and liabilities in exchange for stock was fair and equitable; evidence on issue of compromise was thorough and comprehensive, bankruptcy court was familiar with entire record and touched all material bases of creditors' objections, and court held directly, expressly, or by necessary implication on every substantial point of contention.

Stephen W. Holohan, Noble, Campbell & Uhler, Los Angeles, Cal., for objectors-plaintiffs-appellants.

David A. Gill, Danning, Gill, Gould, Joseph & Diamond, Los Angeles, Cal., for plaintiff in intervention, appellee.

Appeal from the United States District Court for the Central District of California on Appeal from the United States Bankruptcy Court for the Central District of California.

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Before BARNES, GOODWIN and BOOCHEVER, Circuit Judges.

BARNES, Senior Circuit Judge:

William W. Martin ("Martin"), Robert E. Mosher ("Mosher"), and the Legal Action Committee for Marlin Investments ("LAC"), appeal from the district court affirmance of the bankruptcy court order compromising the bankruptcy controversy and approving a settlement agreement entered into between the bankruptcy trustee and the debtors. We have jurisdiction under 28 U.S.C. § 1291 and we affirm.

I. FACTS

This appeal arises from a lengthy and complex proceeding before the bankruptcy court. For purposes of explanation, we must review the factual background leading to the filing of the petition for bankruptcy by the debtors in this action.

Between 1969 and 1975 Mosher and Martin invested in some or all of eighteen joint ventures (hereinafter "the A & C Entities" or "A & C"), each of which consisted of one or more limited partnerships, organized and sold by general partner, Barry Marlin ("Marlin"). The limited partnerships were usually offered as tax-sheltered investments. The A & C Entities owned various rental properties, leasehold interests and promissory notes receivable, some of which were subject to liabilities.

On January 1, 1976, K & K Properties, Inc. ("K & K"), a newly-formed Delaware corporation organized and controlled by William Kane ("Kane") and Barbara Kelly ("Kelly"), assumed the management of the A & C properties. The assets and liabilities of the A & C Entities were

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transferred to K & K in exchange for eighty percent of the K & K stock. Kane and Kelly retained the remaining twenty percent. Marlin remained a general partner and manager of the A & C Entities.[1]

On August 19, 1976, the A & C Entities filed for protection under Chapter XI of the Bankruptcy Act. Numerous disputes arose between the appellants and other investor-creditors, the A & C Entities, K & K, and Kane and Kelly, involving the rights of the various parties in connection with the transaction in which K & K acquired the assets of the A & C Entities. The Legal Action Committee for Marlin Investments ("LAC") was formed by Mosher and Martin to represent the interests of some of the A & C Entities investor-creditors.

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The bankruptcy court approved a compromise on December 21, 1977, ("1977 Compromise") which was negotiated by the parties to this appeal, and actively participated in by appellants. The 1977 Compromise provided for the resolution of disputes which arose from the 1976 agreement in which K & K acquired the assets of the A & C Entities in exchange for stock. Its terms provided (a) for the distribution of some of the K & K stock owned by Kane and Kelly to K & K, and (b) for the previously

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[1]Marlin was later relieved of his duties as general partner and joint venture manager. Criminal proceedings were brought against him in several jurisdictions as a result of his participation in various allegedly fraudulent real estate and financial schemes. These proceedings have resulted in Marlin's conviction and sentence to ten years in prison. However, Marlin is not a party to these appeals. Although several California state court actions were commenced by him and against him, they are not the subject of review herein.

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established voting Trust[2] to exercise its previously established voting rights. In addition, A & C Entities released K & K and Kane and Kelly individually, for any claims or liabilities arising from any association between the parties. As a result of this compromise, certain investor-creditors, including the appellants, sued K & K for breach of contract and fraud.

In an effort to settle and satisfy the claims of the investor-creditors, several plans of arrangement were negotiated and filed with the bankruptcy court. Pursuant to the terms of the 1977 Compromise, to solicit votes of the K & K shares held by the A & C Entities, in order to approve a plan of arrangement for the settlement and satisfaction of the creditors' claims, a K & K Prospectus and proxy solicitation were prepared on August 29, 1978. This Prospectus and proxy solicitation, along with a registration statement, were filed with the SEC in 1980. The Prospectus was prepared by K & K, and included an explanation of the transactions which had occurred, the status of the bankruptcy proceedings, and a financial statement which purported to represent the value of K & K's assets.

During the pendency of the bankruptcy proceedings, in March of 1978, K & K authorized the establishment of an Employment Stock Ownership Trust ("ESOT"). Appellants allege that the provisions of this ESOT, coupled

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[2]This voting trust, established in May, 1976, was entered into by A & C and K & K, and provided that the A & C Entities would transfer their collective shares in K & K (approximately eighty percent of the outstanding shares) to a voting trustee to be selected by the advisory committee of K & K. This committee consisted of the K&K Board of Directors and twenty-two delegates from the A & C Entities.

with the valuation of the K & K shares, were inequitable to the investor-creditors.

On February 20, 1979, Martin filed a complaint, designated "Adversary Proceeding B," for declaratory relief in the bankruptcy court, on behalf of himself and all other creditors, against K & K, Kane and Kelly. On June 4, 1979, Martin filed an amended complaint, designated as "Adversary Proceeding D," which requested relief, based upon allegations of fraud and violations of federal securities laws. The bankruptcy court eventually dismissed this action with prejudice on October 18, 1983. Appellants Martin, Mosher and the LAC had filed other similar litigation dealing with the same matters which were the subject of the Adversary Proceeding D.

After numerous attempts to implement and approve a plan of arrangement had failed, the bankruptcy judge filed an order on September 10, 1979, adjudicating the debtors (A & C Properties, et al.) bankrupt under Article X of the Bankruptcy Act, and appointed Gilbert Robinson ("Robinson") as trustee to supervise the liquidation and distribution of the assets of K & K to its shareholders. Various plans of arrangement were filed in an effort to liquidate the assets of K & K and distribute the proceeds to the shareholders. Robinson became engaged in litigation in both state and bankruptcy courts. He attacked the Voting Trust and sought to gain control of K & K Properties through voting the stock of K & K owned by the A & C Entities.

The bankruptcy court, upon Robinson's unopposed motion, entered an order on July 8, 1981, authorizing him to vote the share of the A & C Entities (which shares constituted a majority of the total outstanding shares in K & K), and to elect individuals to the board of directors.

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These persons all of whom were approved by the Bankruptcy Court, were "independent directors" proposed by Robinson.

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On January 6, 1982, Robinson entered into a settlement agreement with K & K, Kane, Kelly, and Kane and Kelly Associates to provide for the distribution of the K & K assets to the shareholders. The trustee filed an application with the bankrupcty court to compromise the controversy, a notice of this application was signed by the bankruptcy court on January 26, 1982, and mailed to the creditors on February 4, 1982. On June 18, 1982, after numerous hearings on the matter, the bankruptcy court approved the trustee's application to compromise. The court on April 18, 1983, entered its order compromising the controversy, thereby adopting the terms of the settlement agreement, and it entered its findings of fact and conclusions of law to support its order. Appellants filed timely appeals to the district court from the findings and orders of the bankruptcy court. The district court entered its order on June 22, 1984, summarily affirming the bankruptcy court in all respects, finding that the bankruptcy court had committed no error of law and had not committed an abuse of discretion. The appellants filed a timely appeal to this court from the district court's affirmance of the bankruptcy court. Both the district court and this court have jurisdiction to review the decision of the bankruptcy court under 28 U.S.C. §§ 1293 and 1334.[3]

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[3]The effective date of these Code sections was April 1, 1984. The appeals to the district court were filed prior to the effective date of these statutes, on April 28, 1983, August 23, 1983, October 27, 1983 and November 8, 1983. However, Congress provided that during the interim period prior to the effective date of 28 U.S.C. §§ 1293 and

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II. DISCUSSION

The sole issue raised on appeal is whether the district court erred in affirming the bankruptcy court's approval and implementation of a 1982 settlement agreement between the bankruptcy trustee and the debtors where the agreement was objected to by certain creditors.

In an appeal from the district court's affirmance of a decision of the bankruptcy court, our role is essentially the same as that of the district court, and we are, in essence, reviewing the final order of the bankruptcy court. *In re Global Western Development Corp.,* 759 F.2d 724, 726 (9th Cir. 1985) (per curiam).

[1] We review the bankrupcty court's findings of fact under the "clearly erroneous" standard and its conclusions of law *de novo. In re Global Western,* 759 F.2d at 726. However, the bankruptcy court's order approving the trustee's application to compromise the controversy is reviewed for an abuse of discretion. *In re Transcontinental Energy Corp.,* 764 F.2d 1296, 1298-99 (9th Cir. 1985); *Matter of Walsh Construction, Inc.,* 669 F.2d 1325, 1328 (9th Cir. 1982); *In re Blair,* 538 F.2d 849, 851 (9th Cir. 1976).

A. Validity of the Compromise

Under Section 27 of the Bankruptcy Act, 11 U.S.C. § 50 (1976) (repealed 1978),[4] a trustee " 'may, with the ap-

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1334, the appellate jurisdiction of the court would be the same as that provided for in these statutes. Pub.L. 85-598, Title IV, § 405(c)(2), 92 Stat. 2685 (1978).

[4]Although the order approving the compromise was entered after the repeal of the authorizing statute, since the original bankruptcy petition was filed prior to its repeal, the Bankruptcy Act of 1898 governs. *See In re Transcontinental,* 764 F.2d at 1298 n. 2. Even

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proval of the court, compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interest of the estate.' " *In re Transcontinental,* 764 F.2d at 1298 (citation omitted), *Matter of Walsh,* 669 F.2d at 1328. The purpose of a compromise agreement is to allow the trustee and the creditors to avoid the expenses and burdens associated with litigating sharply contested and dubious claims. *Matter of Walsh,* 669 F.2d at 1328 (citing *In re California Associated Products Co.,* 183 F.2d 946, 949-50 (9th Cir. 1950)). The law favors compromise and not litigation for its own sake, *In re Blair,* 538 F.2d at 851, and as long as the bankruptcy court amply considered the various factors that determined the reasonableness of the compromise, the court's decision must be affirmed. *See Matter of Walsh,* 669 F.2d at 1329. Thus, on review, we must determine whether the settlement entered into by the

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trustee was reasonable, given the particular circumstances of the case. *In re Equity Funding Corporation of America,* 519 F.2d 1274, 1277 (9th Cir. 1975).

Appellants argue several grounds for reversing the bankruptcy court's approval of the compromise agreement. We address each separately, in turn.

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assuming that Section 27 does not apply to this order, 11 U.S.C. § 105(a) (1984) allows the court to issue any order, process or judgment necessary or appropriate to carry out the provisions of Title 11.

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1. Burden of Proof and Burden of Persuasion Required to Support Approval of Compromise.

[2] Appellants first challenge the bankruptcy court's conclusion of law, affirmed by the district court,[5] which provided that where a compromise has been negotiated in good faith by a trustee, and is reasonably believed by him to be the best compromise negotiable under the facts of the given case, the court should approve the recommended settlement. Appellants allege that such a conclusion not only misstates the law, but that it places the burden on the objectors to prove that the settlement agreement is not fair, equitable and in the best interest of the creditors.

It is clear that there must be more than a mere good faith negotiation of a settlement by the trustee in order for the bankruptcy court to affirm a compromise agreement. The court must also find that the compromise is fair and equitable. *See, e.g., Citibank, N.A. v. Baer,* 651 F.2d 1341, 1345-46 (10th Cir. 1980).

[3] In determining the fairness, reasonableness and adequacy of a proposed settlement agreement, the court must consider:

> (a) The probability of success in the litigation; (b) the difficulties, if any, to be encountered in the matter of collection; (c) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; (d) the paramount

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[5]Where the district court summarily affirms the bankruptcy court's orders without setting forth separate Finding of Fact and Conclusions of Law, the district court is deemed to have adopted those of the bankruptcy court. *Chase Capital Corp. v. Bumb,* 336 F.2d 1000, 1001 (9th Cir. 1964), *cert. denied,* 380 U.S. 934, 85 S.Ct. 941, 13 L.Ed.2d 821 (1965).

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> interest of the creditors and a proper deference to their reasonable views in the premises.

In re Flight Transportation Corporation Securities Litigation, 730 F.2d 1128, 1135 (8th Cir. 1984) (citations omitted), *cert. denied.* ____ U.S. ____, 105 S.Ct. 1169, 84 L.Ed.2d 320 (1985). *Accord, Matter of Jackson Brewing Co.,* 624 F.2d 605, 607 (5th Cir. 1980) (court must review the particular facts and circumstances with adequate detail and explanation to determine (1) the probability of success in the litigation, with due consideration for the uncertainty in fact and law, (2) the complexity and likely duration of the litigation and any attendant expense, inconvenience and delay, and (3) all other factors bearing on the wisdom of the compromise). The record reflects the careful consideration given to the compromise by the bankruptcy court and the inordinate amount of expertise which went into the ultimate compromise approval. *See In re Blair,* 538 F.2d at 851 n. 1.

The trustee, as the party proposing the compromise, has the burden of persuading the bankruptcy court that the compromise is fair and equitable and should be approved. *In re Hallet,* 33 B.R. 564, 565-66 (Bankr.D.Me. 1983). It is clear from the record that the trustee met this burden. The bankruptcy court held five days of hearing on the trustee's application for compromise. During the hearings, the bankruptcy court weighed the evidence presented, heard testimony on the fairness of the compromise, and considered the objections presented by the appellants.

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[4,5] Appellants argue that the bankruptcy court had ignored their objections to the compromise and had, in essence, shifted the burden of proof to them to show that

the compromise was not negotiated in good faith. However, appellants' argument is not supported by the record. In addition, while creditors' objections to a compromise must be afforded due deference, such objections are not controlling, *In re Transcontinental,* 764 F.2d at 1299; *accord, In re Hallet,* 33 B.R. at 566; *In re The General Store of Beverly Hills,* 11 B.R. 539, 541 (Bankr. 9th Cir. 1981), and while the court must preserve the rights of the creditors, it must also weigh certain factors to determine whether the compromise is in the best interest of the bankrupt estate. *Matter of W.T. Grant Co.,* 4 B.R. 53, 69 (Bankr.S.D.N.Y. 1980).

Any possible inference in the conclusion of law that all that is required for the bankruptcy court to affirm an agreement is the good faith negotiation of a settlement by the trustee is clarified by conclusion of law number 4 which states:

> The Bankruptcy Court has discretion to and should approve the compromise recommended by the Trustee in Bankruptcy after a hearing held upon appropriate notice, where it appears, as it does in this case, that expense, benefits, hazards and complexity of litigation, potential delay and waste of time, effort and expense might otherwise result.

The conclusion of law which appellants challenge did not shift the burden for production of proof regarding the fairness of the settlement agreement. Any error in the conclusion was not material when read in conjunction with the other findings and conclusions which the bankruptcy court made.

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2. **Sufficiency of Findings of Fact.**

The second claim of error asserted by appellants is that the bankruptcy court failed to make findings of fact which (1) reflect a reasoned analysis of the settlement, and (2) permit an appellate court to made a proper review. However, the record, when reviewed as a whole, supports a determination otherwise.

Appellants argue that the holdings in *Protective Committee for Independent Stockholder of TMT Trailer Ferry, Inc. v. Anderson,* 390 U.S. 414, 88 S.Ct. 1157, 20 L.Ed.2d 1 (1968) (*"TMT Trailer"*), and *Matter of Jackson Brewing Co., supra,* require the bankruptcy court to "analyze and describe the merits and essential elements of both: 1) the Agreement as a whole; and, 2) the various claims which it purported to resolve." Appellants allege that the findings of fact and conclusions of law are "boiler plate," and as such are defective since the bankruptcy court failed to include a cost-benefit analysis of the relative merits of pursuing or settling the various claims which the trustee surrendered, or any evaluation of the consideration which he purportedly received. We disagree.

In *TMT Trailer,* the court determined that

> [t]here can be no informed and independent judgment as to whether a proposed compromise is fair and equitable until the bankruptcy judge has apprised himself of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated. Further, the judge should form an educated estimate of the complexity, expense, and likely duration of such litigation, the possible difficulties of collecting on any judgment which might be obtained, and all other factors relevant to a full and fair assessment of the

[p. 1382]

> wisdom of the proposed compromise. Basic to this process in every instance, of course, is the need to compare the terms of the compromise with the likely rewards of litigation.

390 U.S. at 424-25, 88 S.Ct. at 1163-64. However, the Court gives us no specific direction on how much specificity or detail the bankruptcy court is required to put into its findings of fact or conclusions of law in order to comply with the Supreme Court's language.

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In our case, the bankruptcy court's findings of fact and conclusions of law are rather general. However, the bankruptcy court attached to these findings and conclusions a copy of the settlement agreement upon which it relied, and which it approved. The settlement agreement, which is twenty-five pages in length, sets forth in detail the claims which it purports to settle, the parties involved, the valuation of the corporate assets, the identity of shareholders and the number of outstanding shares, the cost-benefit analysis of the relative merits of pursuing or settling the various claims and the conditions which would enable the trustee to proceed with the liquidation. Appellate review is made more difficult by the lower court's failure to write an opinion explaining why it deemed the compromise to be fair, reasonable and adequate. *See In re Flight Transportation Corp.,* 730 F.2d at 1136. However, where the record supports approval of the compromise, the bankruptcy court should be affirmed. *See e.g., Id.*

It is clear from the record before us, which is well over four thousand pages with reporter's transcripts amounting to nearly one thousand pages, that the bankruptcy judge was informed and had apprised himself of all facts

necessary to make an intelligent and independent judgment that the compromise was fair and equitable. The litigation was filed in the bankruptcy court in 1976, and the judge who approved the compromise had handled the matter since 1980. Thus, in addition to the settlement agreement, the bankruptcy judge had heard testomony on the value of the corporation's assets, the terms of the ESOT (which appellants challenge), and was well aware of the claims being asserted by appellants in their Adversary Proceeding D, which was before the court. There is clear support in the record for our affirming the findings of fact with respect to the approval of the compromise.

3. Fairness of the Settlement Agreement.

Appellants claim that the bankruptcy court abused its discretion in approving the settlement agreement and compromise "in the absence of a record which provides an adequate analysis of its merits." A court may approve a compromise or settlement only when it is "fair and equitable." *Matter of Aweco, Inc.,* 725 F.2d 293, 298 (5th Cir.), *cert. denied,* ____ U.S. ____ ,105 S.Ct. 244, 83 L.Ed.2d 182 (1984). An approval of a compromise, absent a sufficient factual foundation which establishes that it is fair and equitable, inherently constitutes an abuse of discretion. *Id.,* 105 S.Ct. at 299. However, the record in the case before this court is replete with factors which support the bankruptcy court's approval of the compromise.

This is not the case where the bankruptcy judge reached for his stamp and marked "approved" without some party supplying concrete facts. *See Matter of Aweco,* 725 F.2d at 300. Appellants argue that neither the court nor the trustee was sufficiently familiar with the ESOT or the Adversary Proceeding D. However, considerable evi-

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dence was presented on the ESOT, including its terms and provisions and its valuation.

The application to compromise the controversy and the settlement agreement, along with the testimony of hearings on the application, indicate that the court made a full and fair independent assessment of the wisdom of the compromise. *Cf. Matter of Boston & Providence Railroad Corp.,* 673 F.2d 11, 12 (1st Cir. 1982). The trustee's application and the settlement agreement set forth in detail the claims pending against the bankrupt estate, and an evaluation of those claims. Furthermore, the findings and order of the bankruptcy court indicate that it made an independent evaluation from the trustee's application and settlement agreement, and from the rest of the proceedings before it. *Cf. id.* at 12-13. The bankruptcy court did not abuse its discretion in approving the compromise.

4. **Consideration of Creditors' Objections.**

Appellants contend that the bankruptcy court's failure to respond to each objection which they raised in their "objection to application to compromise controversy," constituted an abuse of discretion. However, appellants cite no cases directly supporting this proposition.[6]

[p. 1384]

Creditors' objections to a compromise must be afforded deference. *In re Transcontinental,* 764 F.2d at 1299; *ac-*

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[6]Appellants cite *Mandujano v. Basic Vegetable Products, Inc.,* 541 F.2d 832, 836 (9th Cir. 1976), to support their argument that the bankruptcy court abused its discretion in failing to respond to each of their objections. However, that case involved a settlement in a class action suit filed under Title VII of the Civil Rights Act of 1964. The language in *Mandujano* is apparently limited to Title VII actions.

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cord, In re Hallet, 33 B.R. at 566; *In re The General Store of Beverly Hills,* 11 B.R. at 541. In addition, the bankruptcy court is obligated to preserve the rights of the creditors. *Matter of W.T. Grant Co.,* 4 B.R. at 69. However, where, as here, the evidence on the issue of the compromise was thorough and comprehensive, the court was familiar with the entire record and touched all material bases of the creditors' objections, and held directly, expressly or by necessary implication, on every substantial point of contention, the court's approval of the compromise does not constitute an abuse of discretion. *Matter of Jackson Brewing Co.,* 624 F.2d at 612.

5. Exclusion of Evidence and Testimony.

Lastly, appellants argue that the bankruptcy court improperly limited their inquiry and refused to hear testimony on matters which they claim were necessary to the court's arriving at a fair and equitable compromise. Appellants assert that (1) their inquiry regarding the negotiating process with respect to the settlement agreement was relevant to the court's determination of fairness and that the court improperly limited their inquiry, and (2) the bankruptcy court improperly refused to hear testimony on the ESOT, which was necessary to the settlement of claims. These arguments have, at best, little merit.

The bankruptcy judge may give weight to the opinions of the trustee, the parties, and their attorneys. *In re Blair,* 538 F.2d at 851. Furthermore, the court may exclude evidence which is relevant where such evidence creates undue delay, waste of time or needless presentation of cumulative evidence. Fed.R.Evid. 403. In this case, although the bankruptcy court may have limited appellants' questioning of witnesses with respect to the negotiating

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process involved in the settlement agreement, the court did not prohibit such questioning altogether. Furthermore, with respect to the ESOT, considerable evidence was presented and appears in the record. The court permitted testimony on the ESOT and its effect on the settlement agreement. The court did not abuse its discretion in limiting testimony on these matters.

III. CONCLUSION

Appellants have "failed to articulate a coherent explanation of the threat posed to [their] claim by the compromise." *In re Transcontinental Energy Corp.,* 764 F.2d at 1299. Furthermore, when we consider the lengthy delay occasioned by this appeal and the additional attorneys' fees and appellate costs, this appeal, as a whole, may be an example of asset wasting. *In re Blair,* 538 F.2d at 851.

[6] A finding that the compromise is fair and equitable is supported by the record. "As long as the approved plan is fair and equitable, we cannot reject it in favor of a plan that is more equitable." *Citibank, N.A. v. Baer,* 651 F.2d at 1346.

The judgments below are severally AFFIRMED.

APPENDIX B

Chronology of Events

The following chronological outline is designed to assist in placing the various significant events into proper perspective:

Date	Event
January, 1976	Conveyance of property to K&K
May, 1976	Creation of Voting Trust
August 19, 1976	Chapter XI filed
December 21, 1977	1977 Compromise approved by Bankruptcy Court
October 13, 1978	18 individual Chapter XI cases of A & C entities consolidated
March, 1979	Voting Trust purportedly extended until May 12, 1981
March 12, 1979	Adversary "B" filed in Bankruptcy Court; later dismissed with leave to amend
June 4, 1979	Adversary "D" filed in Bankruptcy Court
June 19, 1979	Marlin litigation filed in Los Angeles Superior Court
August 20, 1979	Kane and Kelly filed action against Martin, Mosher and LAC in Los Angeles Superior Court; Martin, Mosher and LAC filed cross-complaint against Kane, Kelly and K&K ("Martin Litigation")
September 10, 1979	Debtor adjudged bankrupt; Trustee appointed; Trustee commences investigation of case; Trustee commences negotiations with Kane and Kelly

Date	Event
December 28, 1979	Trustee files action in Bankruptcy Court to contest Voting Trust and to assert Trustee's right to vote and other rights in and to shares
February, 1980	Kane and Kelly demand return to them of 2,000 shares conditionally ceded to K & K under the 1977 Compromise; K & K complies with such demand
March 14, 1980	Bankruptcy Court judgment regarding Voting Trust
September 16, 1980	Martin, Mosher and LAC file motion to compel Trustee to intervene in Adversary "D" action
May 8, 1981	Superior Court Minute Order entered regarding Voting Trust; Trustee for the first time becomes entitled to vote the K & K shares owned by A & C
May 21, 1981	Trustee seeks Bankruptcy Court approval of slate of independent directors
June 4, 1981	Order entered by Los Angeles Superior Court directing that ownership, voting and other rights be transferred to Trustee
July 8, 1981	Bankruptcy Court enters order approving slate of independent directors; independent directors seated; independent directors commence investigation of and join in negotiations with Kane and Kelly
August 28, 1981	Mosher action filed in U.S. District Court
January 26, 1982	Trustee files Application to Compromise Controversy
January 26, 1982	Trustee files Conditional Intervention in Adversary "D"

Date	Event
January 26, 1982	Trustee files, as plaintiff-in-intervention, Motion to Dismiss Adversary "D"
February 23, 1982	Bankruptcy Court holds hearing on Application to Compromise Controversy (day one)
April 5, 1982	Bankruptcy Court holds hearing on Application to Compromise Controversy (day two)
April 8, 1982	Bankruptcy Court holds hearing on Application to Compromise Controversy (day three)
April 12, 1982	Bankruptcy Court holds hearing on Application to Compromise Controversy (day four)
April 26, 1982	Bankruptcy Court holds hearing on Application to Compromise Controversy (day five)
June 18, 1982	Bankruptcy Court issues written Memorandum Decision approving Application to Compromise Controversy; entered on June 21, 1982
June 30, 1982	Settlement Agreement would by its express terms lapse if not accepted on or before this date
April 18, 1983	Bankruptcy Court enters Findings of Fact and Conclusions of Law in connection with approval of Settlement Agreement
April 18, 1983	Bankruptcy Court enters "Order Compromising Controversy"
April 18, 1983	Bankruptcy Court enters Order authorizing Trustee to file dismissal of Adversary Proceeding "D" subject to Court approval

Date	Event
August 8, 1983	Bankruptcy Court enters Order granting Appellants' "Motion for Stay of Enforcement of Order Entered on April 18, 1983" conditioned upon posting a bond in the amount of $1,000,000; bond was never posted
October 21, 1983	Court orders dismissal of Adversary "D"
June 22, 1984	U.S. District Court enteres Order affirming Bankruptcy Court Orders
September 20, 1984	Martin cross-complaint dismissed by Los Angeles Superior Court for lack of prosecution
March 17, 1986	Ninth Circuit Court of Appeals issues Opinion affirming Bankruptcy Court Orders
May 13, 1986	Ninth Circuit Court of Appeals issues Order Denying Rehearing and Amending Opinion

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On September 12, 1986, I served the within Opposition to Petition for a Writ of Certiorari in re: "William W. Martin vs. Gilbert Robinson" in the United States Supreme Court October Term 1986, No. .....;

on the Parties in said action, by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

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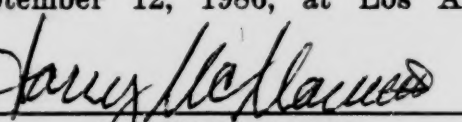
All parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on September 12, 1986, at Los Angeles, California



LARRY MC MANUS